

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALLEN BACON,
Plaintiff,

v.

CDCR SAN QUENTIN PSYCH STAFF,
et al.,
Defendants.

Case No. [19-cv-01612-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

DISCUSSION

STANDARD OF REVIEW

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in order to state a claim a complaint "does not need detailed

1 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]
2 to relief' requires more than labels and conclusions, and a formulaic recitation of the
3 elements of a cause of action will not do. . . . Factual allegations must be enough to
4 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
5 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state
6 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme
7 Court has recently explained the "plausible on its face" standard of *Twombly*: "While legal
8 conclusions can provide the framework of a complaint, they must be supported by factual
9 allegations. When there are well-pleaded factual allegations, a court should assume their
10 veracity and then determine whether they plausibly give rise to an entitlement to relief."
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
13 elements: (1) that a right secured by the Constitution or laws of the United States was
14 violated, and (2) that the alleged deprivation was committed by a person acting under the
15 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

16 LEGAL CLAIMS

17 Plaintiff states that a medical technician attempted to kill him.

18 The treatment a convicted prisoner receives in prison and the conditions under
19 which he is confined are subject to scrutiny under the Eighth Amendment. *Helling v.*
20 *McKinney*, 509 U.S. 25, 31 (1993). "After incarceration, only the unnecessary and
21 wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the
22 Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (ellipsis in original)
23 (internal quotation and citation omitted). A prison official violates the Eighth Amendment
24 when two requirements are met: (1) the deprivation alleged must be, objectively,
25 sufficiently serious, *Farmer v. Brennan*, 511 U.S. 824, 834 (1994) (citing *Wilson v. Seiter*,
26 501 U.S. 294, 298 (1991)), and (2) the prison official possesses a sufficiently culpable
27 state of mind, i.e., the offending conduct was wanton, *id.* (citing *Wilson*, 501 U.S. at 297);
28 *LeMaire v. Maass*, 12 F.3d 1444, 1451 (9th Cir. 1993).

1 Plaintiff states that while insulin was being distributed he informed the medical
2 technician that his glucose test results were 149 and the technician responded if plaintiff
3 would like 36 units of insulin, which plaintiff states would be a lethal dose. Plaintiff
4 responded that would be a nasty way to go and the technician laughed. Plaintiff alleges
5 that this was attempted murder, though he suffered no injury. These allegations fail to
6 demonstrate any constitutional violation. The complaint is dismissed with leave to amend
7 and plaintiff will be provided one opportunity to present a cognizable claim.

8 **CONCLUSION**

9 1. The complaint is **DISMISSED** with leave to amend in accordance with the
10 standards set forth above. The amended complaint must be filed no later than **May 15,**
11 **2019**, and must include the caption and civil case number used in this order and the
12 words AMENDED COMPLAINT on the first page. Because an amended complaint
13 completely replaces the original complaint, plaintiff must include in it all the claims he
14 wishes to present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may
15 not incorporate material from the original complaint by reference. Failure to file an
16 amended complaint may result in dismissal of this case.

17 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
18 court informed of any change of address by filing a separate paper with the clerk headed
19 "Notice of Change of Address," and must comply with the court's orders in a timely
20 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
21 pursuant to Federal Rule of Civil Procedure 41(b).

22 **IT IS SO ORDERED.**

23 Dated: April 16, 2019

24 

25 _____
26 PHYLLIS J. HAMILTON
27 United States District Judge
28

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ROBERT ALLEN BACON,
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 16, 2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Robert Allen Bacon ID: P41600
San Quentin State Prison
San Quentin, CA 94974

Dated: April 16, 2019

Susan Y. Soong
Clerk, United States District Court



By: _____
Kelly Collins, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON